No. 7765

United States Circuit Court of Appeals

For the Ninth Circuit

MARGARET B. BARRINGER and PHOENIX TITLE and TRUST COMPANY, as Trustee,
Appellant,

vs.

GEORGE E. LILLEY, as Trustee in Bankruptcy of the Estate of Windsor Square Development, Inc., a corporation, bankrupt, SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, CENTRAL ARIZONA LIGHT and POWER COMPANY, a corporation, COUNTY OF MARICOPA, a political subdivision of the State of Arizona, STATE OF ARIZONA, JOHN D. CALHOUN, County Treasurer of the County of Maricopa, State of Arizona, MITT SIMS, Treasurer of the State of Arizona, W. R. WELLS, RAYMOND L. NIER, J. ALLEN WELLS, E. L. GROSE and MAUDE M. GROSE, his wife, GLEN E. WEAVER, LUCILLE NICHOLS, NELLIE B. WILKINSON, SUSIE M. WALLACE, E. R. FOUTZ, THOMAS J. TUNNEY and WINDSOR SQUARE DEVELOPMENT, INC., the bankrupt corporation,
Appellees.

Opening Brief of Margaret B. Barringer and Phoenix Title and Trust Company

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STATEMENT OF PLEADINGS AND JURISDICTIONAL BASIS

These are appeals pursuant to sections 24(a) and 24(b) of the bankruptcy act from an order of the District Court for the District of Arizona, affirming a decree of the referee in bankruptcy of said court. George E. Lilley, as trustee

in bankruptcy for Windsor Square Development, Inc., filed his petition alleging that the bankrupt owned 190 lots in Windsor Square, a subdivision, and that Margaret B. Barringer and Phoenix Title and Trust Company claimed interests therein. He prayed that such interests be adjudged void. The referee by his decree so adjudged. A more detailed statement follows below. For brevity's sake, appellants will be called Barringer and Trust Company. The bankrupt will be called Development Company.

Steps before referee.

Development Company filed its voluntary petition in bankruptcy in the District Court (569-571; 2-27). It was adjudged a bankrupt, with the usual order of reference (571-572). The bond of George E. Lilley, its trustee in bankruptcy, was filed and approved (573-574). The bankrupt's trustee filed with the referee a petition to marshal liens on 190 lots in Windsor Square, a subdivision (168, 169-170), alleging that Barringer claimed a lien thereon under a Declaration of Trust executed by her, Trust Company and Thomas J. Tunney, and that her lien was void for the reason that the Declaration of Trust was not recorded, and "for other reasons" not pleaded (170). The trustee further alleged in his petition that Trust Company claimed a lien of unknown nature and extent (171-172). Other claimants were joined (172-173) and the prayer was for an order adjudicating and marshaling liens and for sale free and clear (173-174). An order to show cause issued (176). Trust Company answered the petition, showing that Barringer owned the subdivided tract, conveyed it by recorded deed to Trust Company, as trustee,

for certain purposes,—primarily to secure the debt of Thomas J. Tunney to Barringer. It prayed that its title and the terms of the trust be recognized (323-337). Barringer filed an answer and petition in intervention, setting up the Declaration of Trust and her rights thereunder, denying that the bankrupt had any interest in the 190 lots, and praying that her lien for $75,777.85 owed to her by Thomas J. Tunney be adjudged valid (189-199). Other claimants answered (201-231) and a hearing was had on the trustee's petition at which evidence was adduced (415-680). The transcript of the reporter's notes was filed on April 12, 1932 (410). Five months thereafter, on September 17, 1932, the referee entered his order and decree, adjudging that Barringer and Trust Company had no interest, by way of lien or otherwise, in the 190 lots and ordering that they be sold free and clear (231-253). This order was served on Barringer and Trust Company on September 20, 1932 (254).

Steps on review.

Within ten days thereafter, Trust Company and Barringer filed exceptions to the referee's order and decree (255-258; 343-353) and their petitions for review (259-274; 353-374). In certifying the record, the referee included a summary of the evidence (275-321) but omitted the transcript of the reporter's notes for the alleged reason that they were not timely filed (161). As already noted, they were filed five months prior to the entry of the referee's order and decree. Barringer and Trust Company filed motions (377; 396) to require the referee to certify the transcript of the reporter's notes as a part of the rec-

ord on review, showing that the parties stipulated that they should be so certified and that the summary failed to preserve a single one of the numerous exceptions saved to the referee's rulings and was incomplete and inaccurate in many other respects which will be discussed *infra* (377-384; 396-403). The District Court, after hearing, granted the motion and ordered the referee to certify the reporter's notes as a part of the record on review (409-410). Thereafter, the referee did so (411). A year later, the petitions on review were heard on the record, no evidence being adduced *de novo* (412). On January 7, 1935, the District Court, the Honorable F. C. Jacobs then sitting, entered its order confirming the referee's order and decree (414) to which order of the District Court Barringer and Trust Company excepted (414).

On appeal.

Pursuant to section 24(a) of the bankruptcy act (11 U. S. C. A. 47-a), Barringer and Trust Company filed with the District Court their petition for appeal from the said order of January 7, 1935 (111-113), together with their bond (123-128) and assignments of error (114-122). On February 5, 1935, the District Court allowed the appeal (123). Citation issued (800-801) and was served on each and every party to the cause (801-805).

Pursuant to section 24(b) of the bankruptcy act (11 U. S. C. A. 47-b), Barringer and Trust Company filed, on February 5, 1935, in this court, their petition for appeal from said order of the District Court entered on January 7, 1935 (807-808), together with their assignments of error (809-817). This court allowed the appeal and ordered

that the bond filed below stand (817-818). Citation issued and was served on all parties (818-822). This court ordered that a single consolidated record be filed (683).

Explanatory note.

The statement of the evidence settled by the District Court (681-682) includes not only a narrative statement of the testimony adduced before the referee and reviewed by the District Court (415-680), but also includes the papers certified by the referee, namely, his summary, the referee's decree, the pleadings, petitions to review, etc. (158-414).

STATEMENT OF THE CASE

Barringer, by Warranty Deed duly recorded as a conveyance, conveyed a tract of land to Trust Company, as trustee (419-422). By its terms this deed authorized the grantee to subdivide the tract and sell lots therefrom (419-420). On delivery of the deed, L. D. Owens, Jr., paid Barringer $20,000 (466) and Thomas J. Tunney gave her his promissory note for $85,000 with interest payable quarterly (453). Trust Company, Barringer and Tunney thereupon executed a Declaration of Trust (423-452).

In the Declaration of Trust it was agreed that Trust Company should hold title to the tract in trust for the following purposes:

First: To secure payment of Tunney's debt to Barringer and to secure performance of Tunney's agreements (434);

Second: To sell and convey lots to purchasers at certain prices aggregating $250,000 (434-435).

By the terms of the instrument it was further agreed that Trust Company, as trustee, should execute all sales agreements and deeds (442) and collect all proceeds of sale (443). It was stipulated that Trust Company should apply the proceeds of sale in certain percentages to payment on Tunney's note, payment of taxes, cost of improvements, its own fees, etc., with the surplus over to Tunney (435-438). By the terms of the instrument Tunney agreed to pay all taxes before delinquent and to pay for certain street paving, lights, wells and water pipes (429-433). Furthermore, to repay Barringer within thirty days any moneys she might advance for said purposes (431). It was further stipulated that Tunney should have no interest in the land and that his sole right (defined as personalty) should be to compel performance of the terms of the trust (443, 444).

In the Declaration of Trust, Trust Company acknowledged receipt from Tunney (or others for him) of $30,000, to be applied by it to the cost of the above-mentioned street improvements (429). L. D. Owens, Jr., not Tunney, made this deposit (466) and H. C. Dinmore and S. W. Mills deposited $10,000 additional for the same purpose (466; 568). Tunney signed the note because Owens wished to avoid personal liability (467). Tunney assigned his rights under the Declaration of Trust to Owens, Dinmore and Mills in the following proportions: 5/6, 1/8 and 1/24 (506). They, in turn, in writing endorsed on the assignment, approved and ratified the provisions of the Declaration of Trust (506).

The tract was subdivided under the name of Windsor Square (418) into 264 lots. Trust Company, Barringer, Owens, Dinmore and Mills on two occasions, in writing, modified the terms of the trust (454-462), fixing the release price for each lot (456, 460-462), fixing the sale price of lots at twice their release price (457), and increasing Barringer's share of the proceeds to sixty (eighty percent of seventy-five percent) percent (458-459). It was further agreed that upon payment to Barringer in application on Tunney's note of the release price for any lot, such lot should be released from her lien, provided Tunney's assignees were not in default at the time of such payment (456).

In June, 1929, Owens, Dinmore and Mills, having borrowed $19,000 from a bank, paid $5,150 to Barringer and, pursuant to the last-mentioned provision, obtained the release of 31 lots. To secure the loan they pledged to the bank their rights under the Declaration of Trust with respect to these 31 lots (567, 568). The release of these 31 so-called bank lots (which are not involved in the instant case) left 233 lots subject to Barringer's lien according to the terms of the Declaration of Trust, there being 264 lots in the tract (575). The street improvements were installed under the direction of Holmquist and Maddock, engineers employed by Owens and Dinmore (605, 609). All moneys allocable thereto under the declaration and amendments were applied by Trust Company to the cost of street improvements (471, 562), including the original $40,000 deposited by Owens, Dinmore and Mills and a later one amounting to $13,000 (567-569).

Trust Company, as trustee, sold many lots under contract and delivered conveyances to purchasers who paid out their contracts. The portion of proceeds allocable thereto were applied on Tunney's note and, together with the $5,150 paid by Owens, Dinmore and Mills, reduced the principal to $69,974.70. Sums allocable to interest paid the quarterly installments to and including the one falling due on December 20, 1929 (471-473). Receipts thereafter were insufficient to meet taxes and accruing interest (472). In the Fall of 1930, Barringer with its consent advanced $1,957.93 to Trust Company to pay taxes, pump repairs, etc. (465). These advances were necessary for the preservation of the property (241).

On June 4, 1930, Owens, Dinmore and Mills executed an assignment of their rights under the Declaration of Trust to Windsor Square Development, Inc. (506, 507). No such corporation then existed (529, 533). Owens, Dinmore and Mills (having defaulted in the payment of interest on the Tunney note) were negotiating with Cunningham and others for financial assistance. A plan for the formation of a corporation was discussed. Mr. Dinmore was leaving town, so the instrument was signed (527, 532, 535). Anticipating an agreement would be reached, Cunningham proceeded to organize a corporation under the name of Development Company (520-521). But, his associates lost interest and negotiations ceased (519-521). The assignment was without consideration (516), made tentatively with the hope an agreement would be reached (519, 529). The negotiations never progressed to an agreement reached (529, 518-536).

Its officers and directors never regarded the assignment as operative (519) and the corporation claimed no rights thereunder (518-519). The corporation never did a stroke of business (516-517), issued no stock (518) and on October 24, 1930, reassigned its color of right to Owens (507-508) for the mere asking (516, 519), glad to rid itself of any *appearance* of right under the naked assignment. After adopting a resolution authorizing the reassignment to Owens (508-510), Cunningham and his associates resigned as directors and Cunningham turned over to Owens the corporate books and records upon the latter's promise to accept the resignations of directors and supplant them with others (516).

On the same day, October 24, 1930, Owens executed an assignment in favor of Development Company (510-513) of his rights under the Declaration of Trust, but carving out from the assignment all rights with respect to the 31 lots theretofore released from Barringer's lien (511).

On the very next day, October 25, 1930, Owens, as Treasurer of Development Company, filed its voluntary petition in bankruptcy (abstracted 569-571, *verbatim* 2-27). The original schedules list unsecured debts amounting to $60,013.06 and Barringer as a secured creditor for $74,-170.60 evidenced by Tunney's note, which, according to the schedule, has been assumed by the bankrupt corporation (570). The schedule also avers that this note is secured by mortgage on all lots in Windsor Square under the Declaration of Trust (570). In the schedule of assets are listed the lots in Windsor Square involved in this case as subject to the note, mortgage and trust above mentioned

(570, 571). Subsequently, the bankrupt filed amended schedules, deleting therefrom all reference to such matters (619-622). Unsecured creditors filed claims amounting to $42,946.73 (666-670). These include promissory notes aggregating $35,500 executed by Owens in 1929 (668-669). As already noted, Development Company never had a business transaction from its inception until October 24, 1930. Practically all the claims on their face show they were incurred long prior to the bankrupt's existence. The referee in his decree found that they were incurred, not by the bankrupt, but by its predecessors in interest (237, 238). He further found that the bankrupt assumed these debts (238) but there is no evidence to that effect.

In his decree the referee found that Barringer sold the tract to Owens, Dinmore and Mills (236, 237) ; that Trust Company has no interest therein and Barringer no lien thereon (246) presumably because the declaration was not recorded (246). The referee further found that Trust Company and Barringer "permitted the bankrupt and its predecessors in interest to exercise dominion over, retain possession of, and hold themselves out to the public in general and numerous creditors in particular, as the owners of the property known as Windsor Square * * * that in reliance thereon credit was extended to the bankrupt and its predecessors in interest by creditors" whose claims have been filed and allowed (238-239).

The evidence and referee's order, as already noted, clearly show that no one ever extended any credit to the bankrupt. There is no evidence, whatever, to the effect that Trust Company or Barringer held Owens, Dinmore

and Mills out to the public as owners of Windsor Square. Over Barringer's objection (545), one Grose, who by written contract purchased two lots from Trust Company, as trustee, was permitted to swear he thought he was buying from Owens (551-553). Representatives of two other creditors were permitted to testify that they were ignorant of Barringer's lien (648-651). The credit manager of a publisher was, over Barringer's objection (633-634), permitted to testify that he "dealt with Owens as owner" in extending credit for his principal (633-636). Another creditor, Lieber, whose claim was for $247 (667), over Barringer's objection, testified that Owens told him he owned Windsor Square and that he, the witness, believed it (636-647).

The questions involved are:

(1) Did Barringer sell and convey the tract to Owens, Dinmore and Mills? Appellants contend she did not.

(2) Was the Declaration of Trust void because not recorded? Appellants contend it was not void.

(3) Did appellee plead and prove that Barringer and Trust Company held Owens, Dinmore and Mills and the bankrupt out as owners of the property? Appellants contend no estoppel was pleaded or proved.

(4) Was Owens' scheme of vicarious bankruptcy fraudulent and void? Appellants contend that the assignment to the bankrupt, its pretended assumption of Owens' debts, and the entire bankruptcy jurisdiction were void for fraud.

ERRORS RELIED ON.

The following assigned errors are to be relied upon:

IV	(115-116; 810)	(Error in finding Barringer sold the tract to Owens, Dinmore and Mills);
V	(116, 811)	(Error in ignoring Trust Company's record title and the unrecorded Declaration of Trust);
XV	(120; 815)	(Error in finding appellants held bankrupt's predecessors out as owners of property);
XIV	(119-120; 815)	(Error in finding appellants held bankrupt out as owner of property);
XVIII	(121; 816)	(Error in permitting Grose, Whitney and Lieber to testify they believed bankkrupt's predecessors owned property);
XIII	(119; 814)	(Error in finding bankrupt's predecessors possessed and improved property);
XVII	(121; 815-816)	(The assignment to the bankrupt and its assumption of Owens' debts and the jurisdiction of the bankruptcy court were, respectively, void for fraud under the laws of Arizona);

ARGUMENT.

POINT 1.

THE TRUSTEE IN BANKRUPTCY ACQUIRED NO INTEREST IN THE PROPERTY AND COULD NOT CHALLENGE TRUST COMPANY'S RECORD OWNERSHIP OR BARRINGER'S RIGHTS UNDER THE DEED OF TRUST.

Assignment of Error IV (115-116; 810):

"The District Court erred in its order approving and affirming the Referee's said order in that said Referee erroneously found from the evidence that appellant Margaret B. Barringer in January, 1929, sold said property to Messrs. Owens, Dinmore and Mills, and that they paid to her the agreed consideration therefor, whereas the evidence, as shown by said reporter's transcript, clearly shows that appellant Margaret B. Barringer never sold said property to Messrs. Owens, Dinmore and Mills, and on the contrary conveyed it by duly recorded warranty deed to appellant Phoenix Title and Trust Company, as Trustee, to hold said property for the paramount purpose of securing the said indebtedness of Thomas J. Tunney, who, in a declaration of trust, likewise expressly agreed that the whole of said property should always be held for the purpose aforesaid."

Assignment of Error V (116; 811):

"The District Court erred in approving and affirming the Referee's said order in that the Referee in said order erroneously found and held that the said ownership and title of appellant Phoenix Title and Trust Company, as Trustee, is void as to the Trustee in Bankruptcy and the creditors of the bankrupt for the insufficient reason that a certain declaration of trust, in which it agreed to hold said property and title thereto as security for said indebtedness of Thomas J. Tunney, was not recorded."

Bankrupt's trustee merely succeeded to bankrupt's title under 70 (a) of the bankruptcy act.

This section, 11 U. S. C. A. 110(a), reads in part as follows:

> "The trustee of the estate of a bankrupt * * * shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a

> bankrupt * * * to all * * * (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

This is a mere statute of succession. Under it the bankhupt's trustee merely steps into the bankrupt's shoes. He merely takes such title to property as the bankrupt owned at the date of filing the petition, subject to all claims which were enforcible against the property in the bankrupt's hands.

> *Security Warehousing Co. vs. Hand* (1907) 206 U. S. 415, 423;
>
> *Clark vs. Snelling* (1 CCA 1913) 205 Fed. 240, 242, 243;
>
> *Petition of Cox* (1 CCA 1926) 15 Fed. (2d) 764;
>
> *Sapero vs. Neiswender* (4 CCA 1928) 23 Fed. (2d) 403, 406.

Where the bankrupt had a mere executory right to acquire property on performance of conditions, the bankrupt's trustee cannot acquire the property without performing such conditions.

> *Hull vs. Farmers Loan & Trust Co.* (1917) 245 U. S. 312;
>
> *Burns Mortg. Co. vs. Bond Realty Corp.* (5 CCA 1931) 47 Fed. (2d) 985, 987.

Other sections of the bankruptcy act arm the trustee with the right to defeat claims and liens on the bankrupt's property, although such claims and liens may have been enforcible against the property in the bankrupt's hands. Those sections will be discussed in due course. The start-

ing point is to ascertain what property rights, if any, the bankrupt had, for these alone pass under 70(a) to the bankrupt's trustee.

Bankrupt had no title—no resulting trust in bankrupt's assignors.

In paragraph VII of his decree, the referee found that Barringer on January 14, 1929, sold the tract to Owens, Dinmore and Mills (236). Inasmuch as the uncontradicted evidence showed that Barringer by recorded Warranty Deed sold and conveyed the tract to Trust Company, as trustee (419-422), the referee's finding suggests the implication of a resulting trust from the fact that Owens paid Barringer $20,000 for conveying the tract to Trust Company.

As already noted, the grantee on delivery of the deed executed a trust agreement with Barringer and Tunney (423-452). Among other things, these parties agreed that Trust Company should subdivide the tract by recorded plat (426), that it should, in its own name, sell and convey lots to willing purchasers (442-443; 434-435), and that it should hold title to unsold lots not only to secure payment of Tunney's $85,000 note (434) but, furthermore, to secure performance by Tunney of his agreement to pay all taxes on the tract, together with the cost of certain street improvements (434; 429-432). It was further stipulated in the trust agreement that Tunney, as beneficiary, should and could have no interest in the real estate and that his so-called beneficial interest constituted personalty, to-wit, the right to compel performance of the terms of the trust (Section Thirteen, 443-444).

Tunney immediately assigned his rights as beneficiary to Owens, Dinmore and Mills (506). They subscribed their acceptance and agreed to be bound by all of the terms and conditions of the trust agreement (506). Subsequently, on two occasions they amended and ratified its provisions (454-462). Under such circumstances neither Owens, Dinmore and Mills, nor Owens alone, could claim a resulting trust, *aliquot* or otherwise.

Stelling vs. Stelling (Ill. 1926) 153 N. E. 718, 720;
See Walrath vs. Roberts (9 CCA 1928) 23 Fed. (2d) 32, 33.

The referee found that Tunney acted as a "dummy" (237). True, he signed the note because Owens desired to avoid personal liability (467). He did so for the convenience of Owens, Dinmore and Mills. There is no fraud in such an arrangement and, if there were, certainly Owens, Dinmore and Mills could not complain of an arrangement that was their own.

Bankrupt had mere executory right.

Since Tunney assigned to Owens, Dinmore and Mills and the bankrupt's sole claim is under an assignment from them, we may discuss the nature of the so-called beneficial interest in terms of the trust agreement and amendments. The assignments purport merely to pass Tunney's rights and the bankrupt, itself, in the later assignment expressly agreed that "the title to the above described property is vested in the Phoenix Title and Trust Company, Trustee, and that the right, title and interest of the Assignors hereby assigned is a part of the interest of beneficiaries under Trust No. 418 of the Phoenix Title and Trust Company, under which Trust said lots are held" (510, 512).

Section Thirteen of the trust agreement reads as follows (443-444):

> "It is distinctly understood that the interest of the Beneficiary under this Trust is personal property, and that such Beneficiary has not and shall not have at any time any right, title or interest in or to any property covered hereby, and has not and shall not have any right or power to apply for or secure the dissolution or termination of this Trust or the partition or division of any of the trust property in any manner, except as otherwise provided in this Declaration; the sole right and power of the Beneficiary hereunder being to enforce the performance of the terms of this Trust as expressly set forth herein."

Any construction of the beneficiary's rights, other than the one agreed upon by the parties, would defeat the trust. Unless Trust Company had complete ownership it could not sell and convey lots in fee simple. Even where parties fail so specifically to show their intent, the very nature of a subdivision trust requires the trustee thereunder to have full title.

> *Craven vs. Dominguez Estate Co.* (Cal. 1925) 237 Pac. 821, 823;
>
> *Smith vs. Bank of America, etc. Ass'n.* (Cal. 1936) 57 Pac. (2d) 1363, 1367, 1368.

While the law of trusts before the court in these two cases was statutory, the decision was based, not on statute, but the intent expressed by the parties. In *Smith vs. Bank of America, etc. Ass'n. supra,* the court at page 1368 declared:

> "In short, having no title or estate when they entered into the agreement with the appellant, Sidney

> Smith, they could pass none on to him. If, then, the beneficiaries have neither reserved to them nor vested in them any title or estate during the life of the trust, they are, of course, themselves entirely closed out if and when the trustee forecloses upon default to satisfy the claims of the first payees, as in this case. *We need go no further than to an analysis of the trust agreement itself to come to such a conclusion.*" (Italics ours.)

The primary right of the beneficiary in the instant case was to compel Trust Company to sell and convey lots at specified prices to purchasers produced by the beneficiary (Section Two, as modified, 457) and to get the balance of the proceeds after the amounts allocable to Barringer, taxes, Trust Company's fees, etc., were paid (Section Four, as modified, 458-462).

In the preamble the beneficiary was given the right, if not then in default, to tender the release price to Trust Company (in application on Tunney's debt) for any lot and thereby obtain a release of Barringer's lien thereon. These release prices, as to the lots in controversy, exceeded $90,000 (460-462). The release price on no lot in question was tendered by anyone at any time. It is unnecessary, therefore, to show, further, that this clause did not vest the beneficiary with an interest in a released lot and merely increased his commission on the proceeds of sale.

Bankrupt's judgment creditors could not have reached the real estate.

Section Twenty-One may have given the beneficiary the right to demand a conveyance from Trust Company of all unsold lots on paying all sums due Barringer (450). But,

it is well settled in Arizona that the vendor's reservation of legal title against payment of the purchase price prevents any interest (equitable or otherwise) from vesting in the vendee at any time prior to tender of the purchase price in full.

> *Costello vs. Friedman* (Ariz. 1903) 71 Pac. 935, 937;
>
> *Bennett vs. U. S. Land etc., Co.* (Ariz. 1914) 141 Pac. 717, 720, 721;
>
> *Snow vs. Kennedy* (Ariz. 1930) 286 Pac. 930, 932, 933.

These three Arizona cases do not merely hold that the conditional vendee gets no equitable interest in land as against his vendor. In *Costello vs. Friedman, supra,* it was held that the conditional vendee acquires no interest in real estate upon which execution may be levied. The court, so holding, stated that,—

> "The appellant has very forcibly urged that the purchase agreement between Friedman and Delahanty would have sustained an action on Friedman's part for specific performance. It is not necessary to inquire if Friedman could have enforced specific performance, or if the appellant might have acquired by transfer from Friedman, or, after proper legal procedure, might, even by decree of court, have been subrogated to Friedman's right, and in such right have enforced specific performance of the contract. *The fact remains that he did not do so. Specific performance could only be demanded by Friedman, or any one in his right, upon full performance of conditions precedent required from him.* Story, No. 771. Colson v. Thompson, 2 Wheat. 336-341, 4 L. Ed. 253.

> That had not been done in this instance, or tendered, either by Friedman, or by Costello for him." (Italics ours.)

In *Bennett vs. U. S. Land etc., Co., supra,* the court held that the same rule applies where the vendee under the conditional contract goes into possession. His rights are merely, as those of a lessee, to keep possession until condition broken. In *Snow vs. Kennedy, supra,* the Arizona Supreme Court adopted the following rule from Mr. Pomeroy's work:

> "In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee cannot defeat it by any act or transfer even to or with a bona fide purchaser."

It is clear, therefore, that under section 70(a) the bankrupt's trustee acquired no interest in the land because the bankrupt, at the time its petition was filed, had a merely executory right.

47 (a) does not improve position of bankrupt's trustee.

This section, 11 U. S. C. A. 75(a), vests the bankrupt's trustee, as to property in the custody or coming into the custody of the bankruptcy court,—

> "with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

This simply means that,—

> "The trustee in the interest of the general creditors may therefore contest any claim of lien that a judg-

ment creditor might contest if bankruptcy had not intervened."

Natl. Bank of Bakersfield vs. Moore (9 CCA 1918) 247 Fed. 913, 919.

The hypothetical judgment creditor, as used in 47(a), does not include a hypothetical judgment creditor of Trust Company. It means a judgment creditor of the bankrupt.

"It appears to be thought that the amendment has made trustees 'purchasers for value' as to some or all of the property peacefully coming into their possession. This is not true; the rights of a creditor with a lien have been superadded, but such rights are wholly different from those of a purchaser for value. Since 1910 a trustee has two rights as to property in his custody; i. e., that of the bankrupt and that of such a creditor as is described. They are different rights, sometimes antagonistic; the trustee can take his choice. Further, it is plain that, when speaking of a 'creditor', *Congress means a creditor of the bankrupt; it is impossible that any trustee could exercise the power or right of any creditor of any person,* who (e.g.) might lawfully establish a lien upon property *fortuitously* coming into the court's custody." (Italics ours.)

In re Seward Dredging Co. (2 CCA 1917) 242 Fed. 225, 228.

And, this hypothetical lien does not attach to *everyone's* property, even if the bankrupt's trustee has it in his possession. If the trustee, as assignee of the bankrupt lessee, went into possession 47(a) would not vest in him a lien

on the landlord's title. The hypothetical lien attaches to the bankrupt's estate.

> *In re Lane Lumber Co., Ltd.* (9 CCA 1914) 217 Fed. 550, 552, 553;
>
> *Mason vs. Citizens Natl. Trust & Sav. Bank* (9 CCA 1934) 71 Fed. (2d) 246, 249.

The effective date of the hypothetical lien is that on which the bankrupt's petition was filed (*In re Lane Lumber Co., Ltd., supra*) and the state law determines the rights of the hypothetical lienor (*Natl. Bank of Bakersfield vs. Moore, supra*). The question, therefore, is whether a judgment creditor of the bankrupt could have ignored Trust Company's record ownership, levied upon the property and thereby extinguished Trust Company's title and Barringer's rights under the Declaration of Trust.

It has been seen that the bankrupt had no interest in the lots upon which his judgment creditors could have levied (see pages 16-20, *ante*).

Effect of the recording act.

The bankrupt, it has been seen, had no interest in the land. Hence, failure to record the trust agreement is of no consequence. Possibly, judgment creditors of Trust Company might challenge the unrecorded trust agreement and assert that neither Barringer nor the bankrupt could enforce their rights thereunder. But, as pointed out in *In re Seward Dredging Co.* (2 CCA 1917) 242 Fed. 225, 228, we are not concerned with any judgment creditors other than those of the bankrupt.

But, if the terms of the trust agreement were so tortured as to vest in the beneficiary an interest in the land, that interest by the beneficiary's express agreement was impressed with a lien to secure Tunney's debt. At the very outset the trust agreement, after setting out Tunney's $85,000 note, provides (425):

> "WHICH INDEBTEDNESS is hereby declared to be a first lien upon, and is deemed to be secured by, the entire beneficial interest under this Trust, in the manner hereinafter provided."

The policy of recording acts is to protect purchasers and creditors of the person who appears *of record* to be the owner of an interest. The Arizona recording statute, Section 969, Revised Code, 1928, provides that instruments affecting real estate,—

> "shall be void as to all creditors, etc., unless they are (shall be) acknowledged and filed with the recorder to be recorded * * *."

This section is (except as to the words "shall be" instead of "are" as above indicated) a re-enactment, *verbatim,* of Section 749, Revised Statutes, 1901. The original statute was borrowed from Texas.

Luke vs. Smith (1913) 227 U. S. 378, 380.

It is well settled, both in Arizona and in Texas whence it came, that this statute has no application to instruments affecting an unrecorded interest in real estate.

Jarvis vs. Chanslor & Lyon Co. (Ariz. 1919) 177 Pac. 27, 28;

Sugg vs Mozoch, (Tex. 1927) 293 S. W. 907, 909;

Lewis vs. San Antonio, etc., R. (Tex. 1919) 208 S. W. 552, 208 S. W. 991, 992.

In *Jarvis vs. Chanslor & Lyon Co., supra,* Wetzler, the record owner, placed a deed in escrow for delivery to Charles Jarvis on performance of condition. Prior to performance Charles Jarvis gave plaintiff an unrecorded deed. Defendant, who had a judgment against Charles Jarvis, levied on the land. Thereafter, plaintiff performed the condition, received Wetzler's deed from escrow, and recorded it, together with the deed from Charles Jarvis. In enjoining the sheriff's sale, the Arizona Supreme Court held that:

> "Therefore, under the admitted facts, at the time the levy was made, Charles Jarvis had no interest in the lots. At that time the legal title was in Wetzler and the equitable or beneficial title was in Charles R. Jarvis.
>
> We have no statute that requires the escrow deed from Wetzler to Charles Jarvis to be placed of record before its second delivery. Paragraph 2080, Civil Code of 1913, does not cover the case. Nor would the recordation or the lack of it affect the right of the grantee therein to transfer his equitable interest, or make his interest less or more amenable to attachment by his creditors. It was liable to be subjected to his debts by attachment or execution as long as it was his, but no longer. The fact that he at one time had some interest in the lots did not make them available to his creditors long after he sold to a purchaser for value, and such Charles R. Jarvis appears to be from the complaint, when tested by demurrer."

In *Sugg vs. Mozoch, supra,* the Texas court, passing on the same situation, declared:

> "He is simply claiming a lien on property which was never shown by the records to have belonged to

> the judgment debtor, and which in truth and in fact did not belong to it at the time the judgment was filed and recorded. And under such facts the registration laws have no application."

If an unrecorded conveyance by the owner of an unrecorded equitable interest is good against his judgment creditors, it must follow that an unrecorded equitable mortgage upon an unrecorded interest is good.

POINT 2.

NO ESTOPPEL WAS PLEADED OR PROVED.

Assignment of Error XV (120; 815):

"The District Court erred in approving and affirming the findings of fact of said Referee for the reason that the finding of said Referee to the effect that appellants Margaret B. Barringer and Phoenix Title and Trust Company as Trustee permitted the bankrupt's predecessors to exercise dominion over, retain possession of and hold themselves out to the public in general and numerous creditors in particular as the owners of the property described in said Referee's order of September 17, 1932, and that in reliance thereon, credit was extended to the bankrupt's predecessors by creditors of said bankrupt, is erroneous in that said finding was without support in the evidence before the Referee and is contrary to the evidence."

Assignment of Error XIV (119-120; 815):

"The District Court erred in approving and affirming the findings of fact of said Referee for the reason that the finding of said Referee to the effect that appellants Margaret B. Barringer and Phoenix Title and Trust Company as Trustee permitted the bankrupt to exercise dominion over, retain possession of and hold itself out to the public in general and numerous creditors in particular as the owner of the property described in said Referee's order of September 17, 1932, and that in reliance thereon, credit was extended to the bankrupt by creditors of said bankrupt, is erroneous in that said finding was without support in the evidence before the Referee and is contrary to the evidence."

Assignment of Error XVIII (121; 816):

"The District Court erred in approving and affirming the Referee's said order in that, over appellants' objections, said

Referee permitted witnesses E. L. Grose, Forest Whitney and Henry F. Lieber, respectively, to testify that they believed the property in question to be owned by said Messrs. Owens, Dinmore and Mills, in that the evidence shows no valid grounds existed for their respective beliefs."

Assignment of Error XIII (119; 814):

"The District Court erred in approving and affirming the findings of fact of said Referee, because the finding of the Referee to the effect that Messrs. Owens, Dinmore and Mills, on the consummation of said transaction, went into possession of said property and improved the same, is erroneous, in that the evidence manifestly shows that said Messrs. Owens, Dinmore and Mills never were in possession of said property, and that said property is and always has been vacant and unimproved, and that any and all improvements installed or paid for by said Messrs. Owens, Dinmore and Mills consisting of trees, paving, curbs, lights, sewers and other street improvements, none of which were ever installed on any of the property described in said Referee's order of September 17, 1932."

In paragraph XII of his decree (238-239) the referee found that,—

> "(appellants) permitted the bankrupt and its predecessors in interest to exercise dominion over, retain possession of, and hold themselves out to the public in general and numerous creditors in particular, as the owners of, the property known as Windsor Square and which embraced all of the property described in the petition of the Trustee in Bankruptcy herein, and that in reliance thereon credit was extended to the bankrupt and its predecessors in interest by creditors whose claims have not been paid and which claims have been filed and allowed in the bankruptcy proceedings."

Estoppel not pleaded.

No facts constituting an estoppel were pleaded in trustee's petition to marshal liens, nor was any claim of estoppel made therein (168-174). Appellants on these

grounds objected to any evidence in support of the estoppel theory (633; 638). No issue concerning estoppel was before the court.

See Lusk vs. Bush (9 CCA 1912) 199 Fed. 369, 376;

See Missouri Pac. R. vs. Bartlett (8 CCA 1935) 79 Fed. (2d) 275, 279;

Bigelow on Estoppel (6th ed.) 671.

Estoppel not proved.

Some witnesses were permitted to testify that they believed Owens and Dinmore to be the owners of Windsor Square. The referee's summary (275, 297-302; 311-315) preserves none of the numerous exceptions to the referee's rulings in admitting such testimony. Not only was no estoppel pleaded, but no inducement was proved. The testimony, as shown in the statement of the evidence, is summarized below.

Grose (543-562)

Grose answered the trustee's petition to marshal liens (224-231), alleging that Barringer conveyed to Trust Company, as trustee (226), that Trust Company executed the Declaration of Trust, and that Tunney assigned his rights thereunder to Owens, Dinmore and Mills (227). He alleged that he thereafter purchased two lots under written contract from Trust Company (224-227) and that he was induced to do so by Owens' representation that certain street improvements would be installed (227-229). Alleging that this was not done, he prayed that Trust Company be compelled to convey one of the lots to him at a reduced price (229-230).

The contracts were received in evidence, showing Trust Company, as trustee, to be the sole vendor (551-553). Owens showed him over the tract (545). Grose selected his lot and received a written reservation to purchase the lot from Trust Company (556-557). He made a down payment on the tract, taking Trust Company's receipt therefor (554-555). He forthwith executed the contract at Trust Company's office (547) and made all payments thereunder to it (547). He stipulated in his contracts that the lots were—

> "purchased by the Buyer as the result of said inspection and not upon any representation made by the Seller, or any selling agent, or other agent of the Seller, and the Buyer hereby expressly waives any and all claims for damages because of any representation made by any person whomsoever other than as contained in this agreement, and the Seller shall not be responsible or liable for any inducement, promise, representation, agreement, condition or stipulation not specifically set forth herein." (552-553).

and, as already noted, Trust Company was the sole seller in the contracts.

Over Barringer's objections (545-547) Grose was permitted to swear that he did not know he was dealing with Trust Company (545-546); that Owens told him the purchase price would be reduced if certain street paving were not installed (548-550). On cross examination he stated, by way of conclusion, that Owens and Dinmore were advertising as owners; but on being pressed he retracted this statement (558). After Grose bought his lots, Owens and Dinmore conducted an auction on the tract (559), on

whose behalf not being revealed. His mistaken conception, he confessed, was due to the fact that he did not read his contracts (560).

The bankrupt's trustee could claim no estoppel on the basis of Grose's testimony for several reasons, chiefly: (1) because Grose's belief was not based on any representation made or acquiesced in by appellants; (2) because Grose had no right to believe Owens and Dinmore owned the tract. It might be added that Grose was not even a creditor of Owens and Dinmore, let alone the bankrupt.

Norman (648-650)

This witness, in extending his firm's credit to Owens and Dinmore, had no delusions concerning ownership. He satisfied himself that Owens' credit was good by inquiring at an engineer's office.

D. R. Whitney (651)

His firm delivered paving materials to Owens (650) and failed to collect their cost, $125 (666, 668). He expressed no views on ownership.

Forest Whitney (633-636)

As credit man for a newspaper, this witness extended credit to Owens and Dinmore for advertising matter (633). Over objection, he concluded that he dealt with them as owners of Windsor Square (633-635). His assumption was not based on any representation by Barringer (635-636); he knew nothing concerning the title (636). His belief was based on past dealings with Owens and Din-

more and on advertising (635), the contents of which he could not recollect and which, he conceded, might have disclosed that Trust Company was owner (636).

Lieber (636-647)

Lieber painted signs for Owens and Dinmore and, he swore, in doing so dealt with them as owners of Windsor Square (636). His unpaid bill was for $247 in services rendered in 1929 (667). He believed Owens and Dinmore owned the tract because Owens told him that he, Owens, owned it (638) and because Owens was directing the installation of street improvements (639). He knew that Owens and Dinmore were real estate brokers (641). Orders for signs and sketches thereof left by Owens contained no intimation that Owens or Dinmore owned the tract (642-646). Like Grose, he would not swear that *any* signs painted by him described Owens and Dinmore as owners (641-642). He knew that Trust Company was guaranteeing the title (641), called at Trust Company's office, but not to inquire concerning ownership (641), and was told that Owens and Dinmore would pay their bills (640) and given the impression that Trust Company would pay if Owens and Dinmore failed to do so (640).

Objections to all of this testimony,—as incompetent, not within the issues pleaded, and without any showing of inducement,—appear throughout the record at the pages above noted, together with the exceptions uniformly saved to the referee's rulings.

Obviously, the referee's finding is false insofar as it establishes that the bankrupt corporation was held out as

owner. The witnesses dealt with Owens before the bankrupt's existence commenced. Only three of the witnesses assumed that Owens and Dinmore owned the tract. Forrest Whitney considered them as owners for no good reason at all. Lot-purchaser Grose in writing dealt solely with Trust Company from the outset, His own unreasonable credulity was responsible for his mistaken belief. The issue simmers down to the question of whether sign-painter Lieber had an estoppel to which the bankrupt's trustee is under the bankruptcy act subrogated. The complete answer to this is that Trust Company and Barranger did not hold Owens and Dinmore out to Lieber or anyone else as the owner of Windsor Square. Nor did they acquiesce in, or know of, the false statement which Owens made to Lieber.

Possession and improvements.

There is no testimony tending to show that Owens, Dinmore and Mills (or any of them) exercised dominion over the tract. The evidence shows that they entered it for the limited purposes authorized by the trust agreement, namely, to solicit persons to buy lots from Trust Company and to install certain street improvements (427). These were not placed on the lots, which were vacant except for the hay growing thereon (613). Even the landscaping did not extend to the lots themselves (660). Owens and his associates did not live on the tract (613). Even if they had complete possession, that would not connote ownership. Otherwise, the landlord of every unrecorded lease would be risking his title on the tenant's solvency. Owners, themselves, seldom do their own construction work. They do

not lose their property for failure to record construction contracts. Yet, in the instant case the work was not even performed on the property in question; it was done on the abutting public streets.

To pass title by estoppel requires clear and convincing proof.

> *Mackey, etc. Co. vs. U. S. Gypsum Co.* (D. C. 1917) 244 Fed. 275, 277; Affd. 252 Fed. 397 (9 CCA);
>
> *Holbrook Irr. Dist. vs. Arkansas, etc. Land Co.* (D. C. 1929) 42 Fed. (2d) 541, 548.

It is submitted that the testimony before the District Court not only failed to meet this test. It did not constitute any proof of an estoppel.

POINT 3.

THE WHOLE BANKRUPTCY PROCEEDINGS WERE FRAUDULENT AND VOID.

Assignment of Error XVII (121; 815-816):

"The District Court erred in approving and affirming said Referee's order of September 17, 1932, in that it conclusively appears from the evidence that the transfer by Messrs. Owens, Dinmore and Mills of their rights under said declaration of trust to the bankrupt and the assumption by the bankrupt of their indebtedness were and are, respectively, fraudulent, fictitious and void under the laws of the State of Arizona, and that said order of the Referee and the entire proceedings before the Referee in said bankruptcy estate are fraudulent and void."

It has been seen that the assignment of June 4, 1930, was tentative and made before Development Company was even incorporated. It was not made pursuant to any agreement. It was hurriedly made in the hope that an agreement would be reached simply because Dinmore was leaving town. It was never accepted by the corporate as-

signee when it was organized. On the contrary Development Company gladly divested itself of the false appearance of any rights thereunder, reassigning to Owens on request without any consideration passing. (We assume the assigment was made to Owens alone with the consent of Dinmore and Mills. Otherwise their share of the beneficial interest could not have passed to the bankrupt corporation). Development Company had on October 24, 1930, never transacted any business, incurred any debts, or issued any stock. On October 25, 1930, it pretended to assume the debts of Owens, Dinmore and Mills and to receive from them by Owens' assignment their interest under the trust agreement. It should be noted, however, that their rights under the trust agreement were reserved as to 31 lots on which Barringer's lien had been released. What was the purpose, then, of taking a corporation that had *neither debts nor assets* and *within twenty-four hours* transferring certain assets to it, causing it to assume the transferor's debts, and *throwing it* into bankruptcy? There can under such circumstances be but one answer, namely, that Owens et al., long in default, conceived the expedient of thwarting Barringer's attempt to foreclose their rights under the trust agreement. What other purpose could there be for such vicarious bankruptcy? It is settled by the United States Supreme Court that such an assignment, assumption and the entire bankruptcy proceedings are fraudulent and void.

Shapiro vs. Wilgus (1933) 287 U. S. 348.

In *Shapiro vs. Wilgus* one Robinson was engaged in the lumber business. "He was unable to pay his debts as they matured, but he believed he would be able to pay them in

full if his creditors were lenient". Two of them, however, were recalcitrant, threatening suit. Robinson, "thus pressed, cast about for a device whereby the business might go on and the creditors be held at bay". He organized a corporation, issued to himself its capital stock and had the corporation assume *all* of his own debts in consideration of his conveying to it *all* of his assets. With the assistance of a friendly creditor he filed suit in the Federal District Court for the appointment of a receiver of the affairs of the corporation. Shapiro, one of the unwilling creditors, petitioned the court for leave to levy on the assets in the receiver's hand. His petition was denied. He went to the United States Supreme Court which flatly held the conveyance, assumption and the entire receivership proceedings fraudulent and void. Mr. Justice Cardozo in delivering the opinion at pages 353, 354, declared:

> "The conveyance and the receivership are fraudulent in law as against non-assenting creditors.
>
> "They have the unity of a common plan, each stage of the transaction drawing color and significance from the quality of the other; but, after convenience, they will be considered in order of time as if they stood apart. The sole purpose of the conveyance was to divest the debtor of his title and put it in such a form and place that levies would be averted."

Under the Pennsylvania Statute (exactly like Section 1526 (4) Revised Code of Arizona, 1928) conveyances intended *to delay and hinder* creditors are declared illegal and void. The Court construing this statute at page 354 stated:

> "A conveyance is illegal if made with an intent to defraud the creditors of the grantor, *but equally it is illegal if made with an intent to hinder and delay them.*" (Italics ours.)

Since the conveyance was voidable and fraudulent,—

> "The receivership must share its fate."
>
> "The end and aim of this receivership *was not to administer the assets of a corporation legitimately conceived for a normal business purpose* and functioning or designed to function according to normal business methods." (Italics ours.)

The Court in reversing judgment ordered the District Court below to grant Shapiro's petition in the alternative, by compelling the receiver to pay the debt forthwith or surrender the assets for levy of execution.

The facts in the instant case present a situation that makes the fraud in *Shapiro vs. Wilgus* exceedingly mild. There Robinson subjected *all* of his assets to the ultimate disposal of *all* of his creditors. Here, Owens and his associates not only kept such property as they may have in California and elsewhere. They even carved out from the assignment of their rights with respect to 31 lots on which Barringer's lien was released. They sought to lull their Arizona creditors into believing that their only recourse was against the rights assigned to the dummy corporation.

True, Owens did not form a new corporation. He acquired a second-hand one. But it in all respects was equally good for his purpose. It was a corporation that had neither assets, debts, business, stockholders or directors.

Furthermore, we need not rely solely on inference. Owens' express intent was to use the bankruptcy court to hinder and delay Barringer in her attempt to forfeit or foreclose his rights under the trust agreement. In October, 1930, he was negotiating with Barringer's attorneys for an extension of time for his performance of Tunney's agreements under the note and trust agreement. At these negotiations he threatened to throw "the scheme in some manner into bankruptcy" (494-496). The testimony, showing such threat and intent in the middle of October, 1930, was elicited by opposing counsel on cross examination. It was wholly uncontradicted, and further, was corroborated by Grose, to whom Owens made the same statement (547). Grose, a lot purchaser ceased making payments to Trust Company,—

> "because Mr. Owens told me he was going to put this stuff into bankruptcy."

We submit that the assignment to Development Company and its assumption of the debts of Owens, Dinmore and Mills are unquestionably void and fraudulent and that this Court should order the trustee in bankruptcy either to satisfy and discharge Barringer's lien by payment of the amount due her or surrender any claim to the property.

Respectfully submitted,

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APPENDIX

Section 969, Revised Code of Arizona, 1928:

"Unrecorded instruments void as against purchasers and creditors. All bargains, sales and other conveyances whatever, of any lands, tenements and hereditaments, whether they may be made for passing any estate of freehold or inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they are acknowledged and filed with the recorder to be recorded, as required by law, or where record is not required, deposited and filed with the recorder; but the same, as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof, or without valuable consideration, shall nevertheless be valid and binding."

Section 1526, Revised Code of Arizona, 1928:

"(4) Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."